MINISTER OF LABOUR AND MANPOWER & ANOR. v. WIX CORPORATION SOUTH EAST ASIA SDN. BHD.

[F.C. (Wan Suleiman, Syed Othman & Ibrahim Manan F.JJ.) January 17 & September 15, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 67 of 1978]

Administrative Law — Application for certiorari — Conciliation before the Director of Industrial Relations — Notification to Minister where no likelihood of settlement — Application to produce reports of conciliation proceedings — Whether rules of natural justice apply to process leading to notification of there being no settlement — Industrial Relations Act, 1967, ss. 20 and 54.

Industrial Law — Reports of conciliation proceedings — Whether Director of Industrial Relations obliged to divulge report — Industrial Relations Act, 1967, ss. 20 and 54.

This was an appeal from the decision of the High Court ([1980] 1 M.L.J. 224). In an application for an order of *certiorari* to quash the order of reference made by the Minister of Labour and Manpower to the Industrial Court, the applicant applied for a subpoena directing the Director of Industrial Relations to produce *inter alia* the reports made in the conciliation proceedings. The learned judge in the High Court granted the application and the appellants appealed to the Federal Court.

Held, allowing the appeal: (1) section 20(2) of the Industrial Relations Act, 1967 does not impose any duty on the Director-General of Industrial Relations to decide or determine questions of any kind and to ascertain the law and facts. He is merely required to do his best to get the employer and the employee to settle the dispute. If he is satisfied that there is no likelihood of settlement within a month, he is to notify the Minister;

(2) the rule of hearing both sides has no application when the officer has only to report or notify a factual situation or the result of a dispute in which he does not sit as an arbitrator or adjudicator;

(3) the steps taken by the Director-General which led him to making the notification to the Minister do not involve the exercise of judicial functions which would require the application of the rules of natural justice and the Director-General or the Industrial Relations Officer conducting meetings on his behalf is not obliged to divulge any report he may make to the Minister.

Cases referred to:-

(1) *Board of Education* v. *Rice* [1911] A.C. 179.

(2) *Patterson* v. *District Commissioner of Accra & Anor.* [1948] A.C. 341.

(3) *Selvarajan* v. *Race Relations Board* [1976] 1 All E.R. 12.

(4) *Local Government Board* v. *Arlidge* [1915] A.C. 120.

FEDERAL COURT.

Fong Seng Yee (Senior Federal Counsel) for the appellants.

C.V. Das for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): The respondent company in this appeal was the employer of Mrs. P.K.S. Wong, the 3rd respondent in the application before the High Court for an order of *certiorari* to quash the reference made by the Minister on February 14, 1977 to the Industrial Court for an award to determine whether or not her retrenchment from employment by the respondent company was in effect a dismissal as represented by her.

The application was on 5 grounds stated to fall under the main heads of want of jurisdiction and error of law. They were (1) the Minister acted when Mrs. Wong did not make representations in writing to the Director-General of Industrial Relations (Director-General) within a month of the alleged dismissal; (2) the reference was made when Mrs. Wong had abandoned her employment before invoking relief; (3) at the time of making the representations for reinstatement Mrs. Wong was not entitled to or capable of claiming relief of reinstatement; (4) the Director-General when acting on behalf of the Minister contravened natural justice in having considered extraneous material and representations from Mrs. Wong and her solicitors; and (5) the order of reference itself was bad, having been signified not by the Minister himself but by an officer in the Ministry.

After leave for the application was granted, the respondent company filed a notice of motion and then caused to be issued to the Director-General (2nd appellant) a subpoena *duces tecum* to give evidence on behalf of the respondent company and to produce documents, which were said to be a report by the Regional Director to the Director-General of the conciliation proceeding under section 20(2) of the Industrial Relations Act, 1967 — No. 177 — (the Act); report of the Director-General to the Minister under section 20(3) of the Act; and 2 letters.

At the hearing of the motion, counsel for the Minister made a preliminary objection against the production of the 2 reports claiming that they were privileged documents, being unpublished official records relating to affairs of State under section 123 of the Evidence Act. The 2 letters have been produced by an affidavit of the Deputy Director-General. After hearing arguments, the learned trial judge ruled that the reports were not official records relating to affairs of State and ordered their production.

The appeal is against this finding and the order for the production of the reports. The reason given by the learned trial judge for his ruling may be summarised thus: A dispute between an employee and employer under a contract of service could hardly be said to be an affair of State within the meaning of section 123 of the Evidence Act; as the application for order of *certiorari* was on the grounds of breach of natural justice and excess of jurisdiction by the Minister, it was necessary for the court to have at its disposal all the facts which led to the Minister making the reference to the Industrial Court; the reports could only contain statements of facts by each side, steps taken at the conciliation proceedings, and the reports could only be the reason for the Minister being satisfied that there had been no settlement; in taking the steps leading to the reference by the Minister, the Director-General and the Regional Director were exercising quasi judicial functions and the exercise of such functions by the Minister under the Act does not make the matter an affair of State.

The affidavit of the general manager of the respondent company accompaying the statement said to be showing the grounds on which the order of *certiorari* was sought, deposes these facts: Mrs. Wong was first appointed with the United Motor Works (M) Sdn. Bhd. (UMW) on January 8, 1962. The appointment was confirmed by letter of May 8, 1971. On

September 22, 1972 she was appointed administration manager of the respondent company, a subsidiary of the UMW. By letter dated October 10, 1972 she was confirmed in her appointment at a salary of $1,300 per mensem without any change in the terms and conditions of her employment. By letter dated September 30, 1976 the respondent company notified her that she was being retrenched with due payments of $21,246.67. On receipt of the letter she approached the respondent company and an executive director and it was agreed that the termination of service would be re-classified as "retirement" so that she might receive higher end-of-service benefits. The respondent company replaced the letter dated September 30, 1976 with another letter bearing the same date re-terming the termination of service as "retirement" and increasing the payments due to her to $22,750.67. She was to leave employment from December 31, 1976 but she did not attend or report for work from September 30 to December 31, 1976. Instead, on November 15, 1976 she lodged a complaint (representation) to the Regional Director alleging wrongful dismissal. By letter dated February 14, 1977 the Minister referred the complaint to the Industrial Court.

Mrs. Wong in her affidavit disputed some of the facts deposed by the general manager of the respondent company. Her statement is to the following effect. It was an express or implied term of her employment that she would remain in employment until the retirement age of 50. From September 1 to October 31, 1976 she had been on maternity leave and gave birth to a female child on September 10, 1976. The first letter though dated September 30, 1976 was post-stamped October 4, 1976 and received by her on October 6, 1976. She met the executive director on request and complained to him that she was being dismissed because of personality conflict with the general manager. The second letter though dated September 30, 1976 was only handed to her on October 29, 1976. Although the letter speaks of "retrenchment programme", she is the only one affected. On November 1, 1976 her solicitors wrote to the respondent company demanding reinstatement. There was no response and the solicitors submitted a complaint in writing to the Director-General on November 8, 1976. Subsequently she also personally lodged a complaint (made representations). Conciliation meetings were held before the Industrial Relations Officer, Selangor (who is also known as the Regional Director) on December 20, 1976 and January 12, 1977, but there was no settlement and the Minister referred the matter to the Industrial Court.

From the affidavits, at least 2 of the respondent company's grounds, i.e. (1) and (5), in the application can be disposed of summarily. In ground (1), the respondent company regards the second letter as the effective one. It is not disputed that though this letter was dated September 30, 1976 it was only delivered to Mrs. Wong on October 29, 1976 and that Mrs. Wong made her representations on November 15, 1976. The representations were, therefore, well within the one month period prescribed by section 20(1) of the Act. Ground (5) in effect alleges that the reference as made was bad, as it was not signified by the Minister but by an officer in the Ministry. Section 17 of the Delegation of Powers Ordinance, 1956 clearly provides, *inter alia,* that where power is given to a Minister to give any direction under his hand, it shall be sufficient for such direction to be signified under the hand of or signed by any officer under the administrative control or direction of such Minister.

In this appeal, counsel for the respondent company argues that the reports of the Industrial Relations Officer and the Director-General are necessary in relation to ground (4) of the application. Setting out this ground in full it reads:

"The Director-General of Industrial Relations acting on behalf of the Honourable Minister for Labour and Manpower was wrong in law in receiving and considering extraneous material and representations from the third respondent (Mrs. Wong) and/or her solicitors through letters dated the 8th day of December, 1976 and the 21st day of January, 1977 without according natural justice to the applicant on the said representations. The Director-General of Industrial Relations had, therefore, acted in breach of principles of natural justice."

In the course of arguments, counsel also suggests that the Industrial Relations Officer, after the conciliation proceedings, could not have reported that the matter was fit for reference to the Industrial Court. He further submits that the Director-General in having recommended the reference must have been influenced by the complaints of Mrs. Wong or her solicitors against the Industrial Relations Officer who held the meetings.

The learned trial judge in coming to his finding apparently was mainly concerned with the grounds of the application as a whole and not with specific allegation in reference to the two reports. He said that as the application for *certiorari* was on the grounds of breach of natural justice and excess of jurisdiction, he must have all the facts leading to the reference being made.

Either on ground (4) or on the whole application, the obvious question which should have been examined is whether the rules of natural justice apply to the process leading to the notification of there being no settlement by the Director-General to the Minister.

Subsections (2) and (3) of section 20 of the Act, which are relevant to the question to be determined, read:

"20. (2) Upon receipt of the representations the Director General shall take such steps as he may consider necessary or expedient so that an expeditious settlement thereof is arrived at within a period of not more than thirty days from the date of receipt of the representations. Where the Director General is satisfied that there is no likelihood of the representations being settled within the said period of thirty days or where the representations remain unsettled at the end of the said period of thirty days the Director General shall notify the Minister accordingly.

(3) Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the court for an award."

The best known statement of *audi alteram partem* (hearing both sides) rule, one of the ingredients for the application of the rules of natural justice, as formulated in *Board of Education* v. *Rice*[1] by Lord Loreburn L.C. at page 182, reads:

"Comparatively recent statutes have extended, if they have not originated, the practice of imposing upon departments or officers of State the duty of deciding or determining questions of various kinds. In the present instance, as in many others,

what comes for determination is sometimes a matter to be settled by discretion, involving no law. It will, I suppose, usually be an administrative kind; but sometimes it will involve matter of law as well as matter of fact, or even depend upon matter of law alone. In such cases the Board of Education will have to ascertain the law and also to ascertain the facts. I need not add that in doing either they must act in good faith and fairly listen to both sides, for that is a duty lying upon every one who decides anything. But I do not think they are bound to treat such a question as though it were a trial. They have no power to administer an oath, and need not examine witnesses. They can obtain information in any way they think best, always giving a fair opportunity to those who are parties in the controversy for correcting or contradicting any relevant statement prejudicial to their view."

By section 20(2) of the Act the Director-General has a wide discretion in the choice of steps he may take to get the employee and the employer to settle the dispute. He may speak to the parties personally or write to them to ascertain their position or ask them to attend a meeting before him so that he can guide them to a settlement. He may appoint another officer to act on his behalf. He or his representative may refuse to deal with the agents of the employer or employee, whether they be lawyers or otherwise.

Whether or not a provision of law contemplates any judicial proceeding would depend on its construction. In *Patterson* v. *District Commissioner of Accra & Anor.*[2] the Privy Council dealt with the construction of section 9 of the Peace Preservation Ordinance (Laws of the Gold Coast, 1936 Revision, C.40) which *inter alia* provides:

"A District Commissioner within whose district any portion of a proclaimed district is shall, after inquiry, if necessary, assess the proportion in which such cost is to be paid by the said inhabitants according to his judgment of their respective means."

The appellant, an inhabitant of a "proclaimed district" in respect of which an order for the cost of additional police had been made, failed to pay two sums assessed on him by the District Commissioner, and writs of attachment were issued by the District Magistrate for the levying of the sums out of his property. A motion by the appellant against the respondents to show cause why an order for prohibition should not issue to prohibit them from attaching his property was dismissed. The appeal to the Privy Council was also dismissed. At page 348 their Lordships said:

"... it is difficult to see how the District Commissioner could conduct a judicial inquiry into the respective means of the inhabitants without having any power of compelling parties to attend and disclose their means. Moreover, the wording of section 9, and in particular the phrases 'after inquiry, if necessary' and 'according to his judgment of their respective means' are, in their Lordships' opinion, quite inconsistent with the view that the District Commissioner was to be bound to hold anything in the nature of a judicial inquiry. In their Lordships' view, section 9 of the Ordinance contemplates a simple and ministerial proceeding on the part of the District Commissioner. He has to form an honest opinion as to how the sum prescribed by the Governor ought fairly to be borne by the inhabitants, ... Their Lordships can find nothing in the section which compels the District Commissioner to give each inhabitant, on whom he proposes to make an assessment, an opportunity of being heard before the assessment is made."

From the statement in *Board of Education* v. *Rice, supra,* the rule of hearing both sides applies only when the officer is imposed with a duty to decide or determine questions of various kinds, and when such questions involve law and facts, or even depend on law alone, he is to ascertain the law and facts. The rule has no application when the officer has only to report or notify a factual situation or the result of a dispute in which he does not sit as an arbitrator or adjudicator.

Section 20(2) of the Act plainly does not impose any duty on the Director-General or his representative to decide or determine questions of any kind and to ascertain the law and the facts. He is merely required to deal with the situation in the way he thinks best to get the employer and employee to settle the dispute. If he is satisfied that there is no likelihood of settlement within a month, he is to notify the Minister. Any meeting convened is merely intended to be for the purpose of bargaining between the employer and the employee so that one can see the other's viewpoint and settle the dispute themselves. It is not a forum for discussing rights and the law. The Director-General or his representative sits in the meeting not as an adjudicator but as a mediator or, to use the word envisaged by the provisions relevant in the Act, conciliator. In such position, he is not prevented from expressing his views on any matter which arises for the benefit of either party, having regard to his experience in similar situations and industrial relations in general. Whether or not a settlement is reached is a situation brought about by the parties and not by his assessment of facts. The result is not his decision or determination of questions of any kind. The very fact that the Director-General is not required to notify the Minister when there is a settlement but only when there is no settlement, indicates that the result is determined by the parties and not by him. In notifying the Minister, section 20(2) of the Act does not appear to require him to do so in the form of a report on the circumstances leading to there being no settlement. He is merely to notify the Minister that there has been no likelihood of settlement. Further, in convening a meeting he has no power to compel the attendance of any party. See *Patterson's* case above. If one party does not attend, he may take it that the party desires no settlement. Furthermore, a duty to act judicially in accordance with natural justice arises only in the exercise of functions that are analytically judicial (See Judicial Review of Administrative Action by *S.A. de Smith*, 3rd ed. at p. 161). The Director-General or his representative under section 20(2) of the Act cannot be said to exercise any powers that are analytically judicial. He is merely required to make a notification of an existing fact. No doubt he has in effect to consult both parties before notifying the Minister that there has been no settlement. If he makes his notification without consulting one party, in our view, the effect is that the notification is bad, not because he did not act judicially but because he acted in bad faith by ignoring the requirements of law.

The steps taken by the Director-General to get the parties together for the purpose of conciliation has been described as "conciliation proceeding". The description "proceeding" must have been brought about by section 54(2) of the Act which reads:

"In a proceeding before the court on a reference to the court under section 20(3), no evidence shall be given of any pro-

ceeding before the Director-General under section 20(2) other than a written statement in relation thereto agreed to and signed by the parties to the reference."

The use of the words "any proceeding" in the provision in reference to the steps taken by the Director-General must be taken to be in the loose, and not judicial, sense and must also be taken to give him the option whether or not to have such proceeding. In any case, what should be noted in the provision is that since the legislature has deemed it fit to exclude as evidence such proceeding from the Industrial Court, it should also be excluded from other courts. This provision should indicate that the courts should not be concerned with what transpired at the conciliation proceeding, and where there is no settlement they need only concern themselves with that fact.

To go further, the Court of Appeal in England in *Selvarajan* v. *Race Relations Board*[3] dealt with the role of conciliation in the context of race relations. In that case, Selvarajan alleged a violation of the Race Relations Act because he had not been promoted for 14 years and he attributed his stagnation to his colour. The Board, after an initial investigation, referred the matter to a committee as it suspected that the lack of promotion could have been due to Selvarajan's personality rather than to any racial grounds. The Committee agreed with this summation and Selvarajan failed in his application for *certiorari*. The comments of Scarman L.J. on the role of the Board can be applied here. At page 24 he said:

"The Race Relations Board does not exercise judicial functions. Part II of the Act is absolutely clear. The Board was created so that in the sensitive field of race relations compliance with the law and the resolution of differences could first be sought without recourse to the courts with their necessarily open and formalised judicial process. The board is an administrative agency charged with a number of critically important functions in the administration of the law; but it is not a judicial institution — nor is it the apex of a hierarchy of judicial institutions. The procedures are not adversarial but conciliatory; settlement, not litigation, is the business of the board, and it is left to the board to decide how best to perform the functions which the Act requires it to perform, namely, investigation, the formation of an opinion, conciliation, and, if all else fails, the taking of legal proceedings in the county court."

In the present case too it must be noted that the steps taken by the Director-General or his representative cannot be regarded as adversarial in nature. Their main purpose was to conciliate the parties to a settlement.

The trend by the legislature towards providing for a pre-hearing attempt to settle a dispute is not confined to England or here only. In Australia by section 34 of the Administrative Appeals Tribunal Act 1975 the tribunal is directed to hold a pre-hearing conference if a presidential member thinks it desirable to do so after consideration of the material and if the parties agree. Similarly, by section 22 of the Consumer Claims Tribunal Act 1974-76 of New South Wales the tribunal is directed not to make an order in respect of a consumer claim referred to it until it has brought, or has used its best endeavours to bring, the parties to a settlement acceptable to all of them. (See page 18 of "Natural Justice Principles & Practical Application" by *Geoffrey A. Flick*).

On the face of the two letters which have been made the bone of contention, the main complaint against the Industrial Relations Officer conducting the meeting was that he was voicing his opinion that Mrs. Wong should have given way to the top man of the company. Mrs. Wong herself in her affidavit admits that she had a conflict of personality with the general manager. Apparently she does not seem to accept that an employee harbouring feelings of conflict with the employer would only generate an intolerable situation with the employer. Now, the allegation of the respondent company in ground (4) stated above, having regard to the drift of the arguments here, may be read to the effect that as the 2 letters of complaint by Mrs. Wong's solicitors were not extended to the company, the Director-General in making his notification to the Minister must have been influenced by them and he therefore did not follow the rules of natural justice.

The Director-General in his affidavit has stated that he was not concerned with the two letters. This should be obvious. Whatever wrong anyone might have committed regarding the letters, the undeniable fact is that Mrs. Wong could not be persuaded to change her position, in spite of the efforts of the Industrial Relations Officer who held the meetings. There was still no settlement in the dispute when the conciliation meetings ended.

As indicated, we are of the view that the steps taken by the Director-General which led him to making the notification to the Minister do not involve the exercise of judicial functions which would require the application of the rules of natural justice. Even in a case where a Government department is entrusted with judicial duties, as in *Local Government Board* v. *Arlidge*,[4] the House of Lords held that such Government department determining a housing appeal was not obliged to divulge one of its inspector's report to the appellant even though the report might well have been contained relevant statements prejudicial to his case which he might have wished to controvert.

In the present case, the Director-General is merely required to notify the Minister where there is no settlement. We agree with the learned trial judge that a report, if made, is not an official record relating to affairs of State for the purpose of section 123 of the Evidence Act, but this does not make it relevant for the purpose of the present case. Following *Arlidge's* case, the Director-General or the Industrial Relations Officer conducting the meetings on his behalf is not obliged to divulge any report he may make to the Minister.

The application is referred back to the High Court for further hearing and disposal. By consent half costs to the appellants.

Order accordingly.

Solicitors: *Shook Lin & Bok; Shearn, Delamore & Co.*